82-367

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ALEXANDER L. STEVAS,
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CASE NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1982

WARD W. MILLER,
Trustee in Bankruptcy,
Petitioner

v.

JAMES STEWART LEGARE
HAYNES, SR.,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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I. QUESTION FOR REVIEW

When a man files bankruptcy in 1980, is not his interest in a Navy nondisability enlisted man's pension received since 1971 some form of a present property interest (rather than deriving solely from post- bankruptcy efforts) where:

- the amount received is based upon his pay in the year 1971;
- the present services he must perform are illusory; and
- he will receive the benefits for life under a statutory entitlement defeasible only for cause?

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III. PARTIES TO PROCEEDING

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V. OPINIONS BELOW

The Bankruptcy Court's opinion was not published, and the opinion of the Court of Appeals for the Seventh Circuit appears at 679 F.2d 719. Both are reproduced in the appendix.

VI. JURISDICTION OF THIS COURT

The Seventh Circuit Court of Appeals on June 7, 1982, affirmed on direct appeal a March 6, 1981, order and judgment of the United States Bankruptcy Court, Northern District of Indiana, Fort Wayne Division, denying the Trustee's Application for Turnover. Jurisdiction to review the Seventh Circuit Court of Appeals by Writ of Certiorari is conferred upon the Supreme Court by 28 U.S.C. §1254.

VII. APPLICABLE STATUTES

This case involves the interplay of the 1978 Bankruptcy Code (11 U.S.C. §541) with the provisions of 10 U.S.C. §6330, granting a pension to a retired sailor, and 10 U.S.C. §§6482 and 85, setting forth the few continuing obligations of a retired sailor. These statutes are reproduced in the Appendix.

VIII. STATEMENT OF THE CASE

In 1971, when he was either 35 or 37 years old, Haynes retired from the U.S. Navy with a pay grade E-7 after completing 20 years honorable service. Each month afterward, Haynes received a check from the U.S. Navy, pursuant to 10 U.S.C. §6330, for an amount which equalled one-half of the current pay of an active E-7; at the time he filed bankruptcy this was approximately $610 per month. Haynes has received these monthly payments since 1971, and, absent divestment for cause, will continue to receive them for the rest of his life.

Haynes and wife, then residents of Indiana, filed a joint voluntary bankruptcy petition pursuant to 11 U.S.C. §302, in the United States Bankruptcy Court for the Northern District of

Indiana, Fort Wayne Division on July 11, 1980, listing some $10,978.31 in unsecured debt.

After the first meeting of creditors, the Trustee sought an order from the Bankruptcy Court directing the debtor to turn over to the estate, upon receipt, for the benefit of creditors, the pension proceeds, which he perceived as a pre- sently vested property interest.

On March 6, 1981, the Bankruptcy Court denied the request for turnover, and the Trustee then directly appealed the matter to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1293(b). On June 7, 1982, the Court of Appeals affirmed the Bankruptcy Court on the basis that the proceeds represented current compensation for current services, which would exempt

them from bankruptcy administration under 11 U.S.C. §541(a)(6).

IX. ARGUMENT FOR ALLOWANCE OF WRIT

A. IMPORTANCE

Certiorari should be granted because the Court of Appeals has erroneously decided an important question of federal law in a manner totally in conflict with applicable decisions of this Court from this century.

The question here - the nature of military retirement pay - is an important one to both bankruptcy administration and also to military personnel policies. The very issue here was recently deferred by this Court in McCarty v. McCarty, - U.S. - , 69 L.Ed. 589 at 600, 101 S.Ct. - (1981) and a definitive ruling would clarify much uncertainty in these areas.

B. PROPERTY IN BANKRUPTCY

Under 11 U.S.C. §541(a)(1):

> "all legal or equitable interests of the debtor as of the commencement of the case"

pass to his bankruptcy estate for administration. No longer does it matter if the property is "past-rooted" or "future-rooted:"

> "Section 541(a)(1) has the effect of overruling the Supreme Court's holding in Lockwood v. Exchange Bank [190 U.S. 294, 74 L.Ed 1061, 23 S. Ct. 47 (1903)] in that it includes as property of the estate all property of the debtor including that necessary for a fresh start." (emphasis added)

4 Collier on Bankruptcy (15th Ed.) ¶541.01 at 541-6 and ¶541.06 at 541-26.

> "[O]nce the estate is created, no interests in property of the estate remain in the debtor."

4 Collier on Bankruptcy (15th Ed.) ¶541.06 at 541-27.

If a debtor wishes to retain an asset as exempt from creditors:

> "the debtor, rather than initially withholding property that he claims is exempt, will actually be seeking a return from the estate of the property in question."

3 Collier on Bankruptcy (15th Ed.) ¶522.26 at 522-64. That retention as exempt would require the debtor to find a statutory exemption from execution, for which none exists applicable to Navy retirement pensions.[1]

The property passing to the estate is that in which the debtor has some interest when the bankruptcy was filed.

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[1] Unlike exemptions provided for V.A. administered pensions, those received by Congressional Medal of Honors winners, and numerous other federal retirees:

> "...either through legislative oversight or intentional deletion, Congress has failed to provide that Navy retirement pensions are free from levy and attachment."

In re Nunnally, 506 F.2d 1024 at 1025 (5th Cir. 1975).

Those properties in which he had no beneficial interest are excluded from the estate by 11 U.S.C. §541(b), and those which he only acquires through his subsequent labors do not pass to the estate by 11 U.S.C. §541(a)(6). Nonetheless, a present property interest passes to the estate despite its novelty, contingency, or postponement of enjoyment, Segal v. Rochelle, 382 U.S. 375 at 379, 15 L.Ed. 2d 428, 85 S.Ct. 511 (1966), 4 Collier on Bankruptcy (15th Ed.) ¶541.07[2]. Present property interests also pass to the estate notwithstanding applicable nonbankruptcy prohibitions on alienation, 11 U.S.C. §541(c)(1)(A).

This Court has already held that a retired sailor has an "entitlement" to the continued receipt of his Navy retirement pay, McCarty, supra, 69 L.Ed.2d

at 601,[2] and this Court has repeatedly held that an entitlement to government benefits constitutes a protectable property interest. If it is an entitlement, rather than a mere expectation, the retirement pay would constitute a property interest subjecting the pension to bankruptcy administration along with "all" other properties.[3]

C. ENTITLEMENT

The Court of Appeals held Navy retirement pay compensation for reduced services, rendered after retirement, such that made it an "after-acquired" property, not passing to creditors in bank-

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[2]At footnote 17 the Court concluded: "We hold only that ... Congress intended retirement pay to be a 'personal entitlement.'"

[3]Indeed, by 11 U.S.C. §522(d)(10)(b), an exemption provision not applicable to Haynes as a resident of Indiana when he filed, Congress includes in its enumeration of "property" the debtor's right to receive a "veteran's benefit."

ruptcy by 11 U.S.C. §541(a)(6). The Court of Appeals implicitly rejected the proposition the pension could constitute a presently existing property right under "statutory entitlement" standards recognized by this Court for decades.

Instead, it mistakenly relied upon United States v. Tyler, 105 U.S. 244, 26 L.Ed. 985 (1881) in concluding the pay entirely current compensation for current services. Tyler dealt with a disabled officer in a pension dispute with the Army, and in an age before the recognition of entitlements as vested property interests. In reliance upon Tyler, the Court of Appeals in this case simply avoided the mainstream of 20th century property analysis.

The "entitlement" to the benefit, versus a mere hope or expectation, determines whether the recipient has a

protectable property interest:

> "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." (emphasis added).

Board of Regents v. Roth, 408 U.S. 564 at 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Here, Haynes has more than a unilateral expectation of his monthly pension checks; he has a legitimate claim of entitlement to them, by 10 U.S.C. §6330.

Haynes' retirement pay can be terminated only for cause; for the misconduct provided by 5 U.S.C. §8312 through §8315; his disobedience of a lawful order; or as a result of a conviction

by a military tribunal. This limited defeasibility, however, does not remove the entitlement from legal protection:

> "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in State law, which cannot be removed except for cause. Once this characteristic is found the types of interests protected as property are varied, and, as often as not, intangible, relating to the whole domain of social and economic fact." (emphasis added)

Logan v. Zimmerman Brush Co., -U.S.-, - 71 L.Ed.2d 265 at 275, -S.Ct.- (1982).

This Court has recognized that entitlements conditioned upon continuing service obligations nonetheless constitute protectable property interests, Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970)(AFDC benefits), Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) (Social Security disability benefits).

The sailor, like the Social Security recipient or welfare recipient, has a statutorily created immediate right to payment. His pension, however, can be terminated only for cause, and is intended to normally be paid out for the rest of the retiree's life. AFDC, the cognizable property by Goldberg, supra, is not intended to be of lifetime duration at all; is defeasible upon any number of grounds not amounting to high treason; and subjects its recipient to far more actual present obligations than the retired enlisted man's few theoretical burdens.

The entitlement to the pension recognized by McCarty, supra, makes it a presently cognizable property interest of Haynes notwithstanding some minor future service obligations. Indeed, the Fifth Circuit so concluded by In re

Nunnally, 506 F.2d 1024 at 1025 (5th Cir. 1975).[4] The Seventh Circuit here, however, focusing entirely upon these phantom obligations, completely overlooked the presently protectable nature of Haynes' interest in his continued pension receipts.

D. SERVICES ILLUSORY

The services the Court of Appeals found Haynes obliged to perform were that he might be obligated to two months active duty training every four years if the Secretary of the Navy so ordered, 10 U.S.C. §6485(b); he might be subject to recall to active duty if war or an emergency were declared, 10 U.S.C. §§6482 and 6485(a); and he might be tried for

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[4] Under the prior Act, Nunnally held it to be an inherently exempt property because future-rooted, a distinction no longer viable.

some offense by a military tribunal under the Uniform Code of Military Justice, 10 U.S.C. §802(6).[5]

These current obligations are illusory. There is nothing in the record to suggest that Haynes has, or has not, actually been obligated to attend training camp. If he has been, then the $30,000 he receives every four years for two months camp duty equals an annual rate of compensation of some $180,000, a rate to which no admiral can aspire. That rate is one of unreasonable proportions, particularly where it might be deemed pay for only the possibility of training camp.

While Haynes, as a retired sailor still a member of the Navy, might be

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[5]The burdens imposed upon a retired enlisted man are significantly fewer than those of a retired officer.

punished by a court martial, all he generally need do is avoid conduct which would be equally punishable as criminal in a civilian context. The proposition of actually paying Haynes for his subjection to courts' martial jurisdiction introduces the suggestion that he would lead a life of crime were he not paid to obey the law, and any contract so based would be unenforceable for lack of a valid consideration.

The primary obligation borne by Haynes, as a retired enlisted man, is his possibility of recall to active duty upon declaration of war or national emergency. This obligation is hardly a sword of Damocles unique to Haynes or other retired enlisted men. In the event of mobilization, not only Haynes, but also every civilian citizen not exempted by 50 App. U.S.C. §456, is

subject to conscription for the active military defense of our country. The mere possibility of Haynes' future recall into the active naval service is no more of a present obligation on his part than is the necessity of the average 19 year old male to carry his Selective Service registration card with him. Each bears the potential of a future obligation to serve the country, but neither has any significant present constraints upon his time or liberties deserving of monetary compensation.

Attempting to base Haynes' receipts upon his present activities for the Navy - or to suggest he has any "current services" whatever - simply indulges in the rankest speculation as to the nature of the services and the rate of compensation. Even if he does have <u>some</u> current service obligations, however, the "enti-

tlement" does not cease being a property; the welfare recipient's current burdens are far greater, yet she has a presently vested property interest.[6]

E. DEFERRED COMPENSATION

As a mathematical matter, what Haynes now receives has no real bearing to what, if anything, he is now doing.[7] His retirement pay is an amount equalling one-half of his pay upon the termi-

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[6] In Indiana, at least, the welfare recipient may be required to participate in job training, I.C. §12-1-7-4; obligated to submit to home investigations, I.C. §12-1-7-6; obligated to divulge otherwise confidential medical information, I.C. §12-1-7-14.9(c); obligated to divulge detailed financial information to the Department of Public Welfare, and to continually update that information within 7 days of any change, I.C. §§12-1-7-6 & 7; and obligated to initiate and participate in litigation desired by the D.P.W., I.C. §12-1-7-1.1. With all of these present obligations, far exceeding those of a retired sailor, the AFDC recipient has a presently vested property right in her benefits.

[7] If recalled to active duty, he would be paid commensurately, 10 U.S.C. §1402.

nation of his active duty service in the year 1971.[8] It is related to the past, not the present or future. Haynes earned the pension between 1951 and 1971, and the government saw its primary benefit fulfilled at that time, not now.[9]

Viewed from the government's vantage, the Navy receives no present consideration for what it pays out. It had Haynes' services until 1971 and his retirement at that point; but his future

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[8] 10 U.S.C. §6330(c).

[9] According to the majority opinion in McCarty, 69 L.Ed.2d 589 at 606:

> "...Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet personnel management needs of the active military forces."

The first of these Congressional goals is wholly consistent with retirement pay being a form of deferred compensation for services previously rendered. Of the "personnel management needs" motivating Congress, the ready access to recall of experienced enlisted men in time of war is a goal subordinated to the military's need to simply get older members out of the way. McCarty, supra, 69 L.Ed.2d at 593.

service, in the event of an emergency, comes only at the cost of then putting him back on full pay.

F. ENJOYMENT

In a broad sense, property can be nearly any right of value.

> "The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists of the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land.

1 Bl. Comm. 138; 2 Bl. Comm. 2, 15. Nonetheless, the fluidity of man's relationship with things, others, and his government over the centuries has precluded any fixed definition of "property:"

> "[I]t is impossible to give any categorical definition to the word 'property' nor can we

attach to it in certain relations the limitations which would be attached to it in others."

Fisher v. Cushman, 103 F. 860 at 864 (1st Cir. 1900). According to 63 Am. Jur. 2d "Property" §3:

"Property...is composed of certain constituent elements, namely, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. Of these elements the right of user is the most essential and beneficial. Without it all other elements would be of little effect, since if one is deprived of the use of his property, little but a barren title is left in his hands." (citations omitted)

Here, Haynes has the right, subject only to divestment for cause, to receive the pension checks for the rest of his life. He need only negotiate the checks, something no other person has the authority to do. He may spend them as he pleases, and he has not been salting them away for his old age.[10] Upon reaching a normal retirement age of 65,

since he now has more than a decade of civilian employment behind him, Haynes will also receive Social Security benefits. Unlike the retirement pensions of those veterans whom Congress has exemplified for their bravery or sacrifices, Haynes' pension may be seized or levied upon by his creditors - as may his other properties - to satisfy his obligations. Haynes' dominion to the pension proceeds is complete because paramount to the rights of anyone save the governments', and the proceeds are leviable in a non-bankruptcy context, as are his other property interests.

G. APPORTIONMENT

In dealing with the retirement pay of a commissioned Navy officer (whose

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[10] His pro se response to the rule to show cause with the Court of Appeals indicate he is still employed as a truck driver and has been trying to pay old or current bills with the checks.

constraints are far greater than those upon an enlisted man) this Court has recognized in McCarty, supra, 29 L.Ed.2d at 600, footnote 16, that:

> "...the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that States must tread with caution in this area...."

The other part, of course, to Congress' motivation would have been as deferred compensation for past services. In accord is Hooper v. United States, 326 F.2d 982 (Ct.Cl. 1964) which noted at 987:

> "The salary he received was not solely for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies."

Viewed most charitably to Haynes, the retirement pay could be seen as a mixed breed of deferred compensation

and reduced current compensation. Even so, where both pre-petition and post-petition services are involved:

> "[T]he courts have been adroit in effecting apportionment of compensation for prebankruptcy services when the bankrupt's right did not depend on a post-bankruptcy contingency." (citations omitted)

4A Collier on Bankruptcy, (14th Ed.) ¶70.34 "Wages, Fees, & Commissions" at 450.

For instance, a life insurance salesman's renewal commissions for policies written before bankruptcy, when the debtor has some, usually minor, services to render thereafter, are apportioned between him and the estate, In re Wright, 157 F. 544 (2nd Cir. 1907), as are profits from a joint venture, Hudson v. Wylie, 242 F.2d 425 (9th Cir. 1957), and as are attorney's fees for services rendered both before

and after bankruptcy, Parkford v. Commissioner, 133 F.2d 249 (9th Cir. 1943), cert. den. 319 U.S. 741, 87 L.Ed 1698, 63 S.Ct. 1029.

Even assuming Haynes did have some post-bankruptcy services to render, the Court of Appeals erred in not remanding for an apportionment of the pension proceeds into pre- and post-bankruptcy segments.

H. SUMMARY

Since 1971, Haynes has enjoyed a statutory entitlement, by 10 U.S.C. §6330, to half his former pay grade, which is removable only for cause. Under all of this Court's recent analyses of property interests, Haynes enjoys a presently vested "property" interest, which, in a bankruptcy context, should pass to the estate for the benefit of creditors. "All legal or

equitable interests" in property rights, without exception, pass to the bankruptcy estate under 11 U.S.C. §541(a)(1) In re Smith, 640 F.2d. 880 (7th Cir. 1981), and the Fifth Circuit has already deemed the retirement pay a property interest.

The Court of Appeals for the Seventh Circuit, however, held that Haynes' receipt of these monies constituted current compensation for current services rendered the Navy, and thus did not constitute a vested property interest. In so holding, it ignored this Court's recognition of retired pay as an entitlement; it ignored this Court's equation of entitlement with property; and it strained reason to find current services.

Even if some current services were present, the qualities of property do

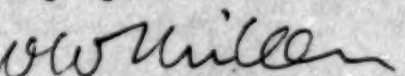
not disappear, and an apportionment between pre- and post-bankruptcy shares would have been appropriate.

The utility of administering the pension in bankruptcy is obvious. In perhaps two or three years, all Haynes' debts would be paid and the pension would then revert back to him, nearly twenty years before normal retirement age. Both competing goals of bankruptcy legislation would be served: Haynes would have achieved the temporary relief from creditor process and a "fresh start," and his creditors would be satisfied.

WHEREFORE, petitioner respectfully prays the Court to grant a Writ of Certiorari to the Court of Appeals for the Seventh Circuit because it erroneously decided an important issue of Federal law in a manner inconsistent

with applicable decisions of this Court, and to direct the parties to fully brief the matter for the Court's consideration.

Ward W. Miller, Trustee in Bankruptcy, Petitioner

By: 
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X. APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1421

IN THE MATTER OF:

JAMES STEWART LEGARE HAYNES, SR. and JOANNE GRACE HAYNES,

Debtors.

APPEAL OF:

WARD W. MILLER.

Appeal from the United States Bankruptcy Court for the Northern District of Indiana, Fort Wayne Division.
No. 80-B-10548—Robert K. Rodibaugh, *Judge.*

ARGUED MAY 12, 1982—DECIDED JUNE 7, 1982

Before BAUER and ESCHBACH, *Circuit Judges*, and JAMESON, *Senior District Judge.**

BAUER, *Circuit Judge.* Ward W. Miller, trustee in bankruptcy for the joint estate of Mr. and Mrs. James S. Haynes, Sr., appeals from the bankruptcy court order denying his request for turnover of Haynes' Navy retirement pay to the bankruptcy estate. We affirm.

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* The Honorable William J. Jameson, Senior District Judge of the United States District Court for the District of Montana, is sitting by designation.

I

Haynes retired from the Navy in 1971 after completing twenty years of service. Upon his retirement, Haynes was transferred to the Fleet Reserve and began receiving retainer pay. 10 U.S.C. § 6330. Sometime in 1981, Haynes was transferred to the retired list of the Regular Navy, whereupon his retainer payments ceased, and he began receiving retirement pay. *Id.* § 6331. He presently receives approximately $610.00 per month retirement pay.

Haynes and his wife filed a joint voluntary petition for bankruptcy on July 11, 1980. 11 U.S.C. § 701 *et seq.* They listed Haynes' Navy retirement pay as income. On August 11, 1980, the trustee in bankruptcy requested the bankruptcy court to order Haynes to turn over his retirement pay to the estate. *Id.* § 542(a). The trustee contended that the retirement pay was nonexempt property of the estate. *Id.* §§ 522, 541(a). The bankruptcy court entered an order on March 6, 1981, denying the trustee's request. The bankruptcy court held that Haynes' retirement pay was proceeds for services performed after Haynes filed the petition for bankruptcy, and, thus, it was not property of the estate. *Id.* § 541(a)(6).

II

Section 541 of the Bankruptcy Code broadly defines the bankrupt's estate as including "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Proceeds the debtor receives for services performed after filing the bankruptcy petition, however, are not property of the estate. *Id.* § 541(a)(6). The sole issue in this case is whether Haynes' retirement pay is proceeds for services performed after Haynes filed the bankruptcy petition.

From 1971 to 1981, Haynes received retainer pay for serving in the Fleet Reserve. As a member of the Fleet Reserve, Haynes was required to perform up to two months of active duty training every four years if

ordered to do so by the Secretary of Navy. 10 U.S.C. § 6485. Until 1977, Haynes was also required to report to the Navy for a physical examination at least once every four years. The Secretary of the Navy could have terminated Haynes' retainer pay if Haynes had failed to report for the examination. *Id.*[1] Moreover, Haynes was subject to recall to active duty in time of war or during a national emergency declared by the President or Congress or whenever otherwise authorized by law. *Id.* He also remained subject to the Uniform Code of Military Justice and could be tried by a military court-martial without the constitutional safeguards that are available to civilian citizens. *Id.* § 802(6). If convicted, Haynes could be dishonorably discharged and required to forfeit further retirement pay. *Id.* § 856. In 1981 after Haynes became a retired member of the Regular Navy, he remained subject to the Uniform Code of Military Justice, *id.* § 802(4), and could be recalled to active duty in time of war or national emergency. *Id.* § 6482.

Under most pension plans, the retiree is not required to perform any services for his former employer. The military retiree, however, remains obligated to the federal government to perform certain duties. *See, e.g.*, 10 U.S.C. §§ 6482 & 6485. If the retiree fails to perform these duties, his retirement benefits may be terminated. *Id.* § 856. Several courts, including the Supreme Court, have concluded that because the military retiree has continuing duties, military retirement is more like wages than it is like a pension. *United States v. Tyler*, 105 U.S. 244 (1881); *Costello v. United States*, 587 F.2d 424 (9th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); *Abbott v. United States*, 200 Ct. Cl. 384, *cert. denied*, 414 U.S. 1024 (1973); *Watson v. Watson*, 424 F. Supp. 866 (E.D.N.C. 1976). We agree. In light of the obligations imposed on a military retiree as conditions of receipt of retirement pay, military retirement pay is actually

[1] Members of the Fleet Reserve are no longer required to report for physical examinations. 10 U.S.C. § 6485 (amendment effective July 30, 1977).

reduced compensation for reduced current services. *United States v. Tyler*, 105 U.S. 244, 245 & 246 (1881). *See also McCarty v. McCarty*, ... U.S. ....., 49 U.S.L.W. 4850 (June 26, 1981). Haynes's retirement pay is proceeds for services performed after the filing of the bankruptcy petition, and, thus, it is not property of the estate. 11 U.S.C. § 541(a)(6).

The judgment of the bankruptcy court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF	)	
	)	
JAMES STEWART LEGARE	)	
HAYNES, SR.	)	CASE NO. 80-10548
and	)	
JOANNE GRACE HAYNES	)	
	)	
Debtors	)	

O R D E R

At South Bend, Indiana, on March 6, 1981.

This matter is before the Court on the trustee's application for turnover order pursuant to Section 542(a) of the Bankruptcy Code which states:[1]

Section 542. Turnover of property to the estate.

> (a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or

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1. 11 U.S.C.A. §542(a) (1979).

> that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

This cause came on for hearing before the Court on October 2, 1980, and after the filing of briefs was thereafter taken under advisement.

The evidence indicates that the debtor, James Stewart Legare Haynes, Sr., after retiring from the United States Navy in 1971, has been receiving a full pension of approximately $7,200.00 annually. The trustee contends that future naval retirement benefits are a property right of the debtor which pass to the estate for the benefit of the debtor's creditors. Although the debtor has claimed no exemption pertaining to the benefits, the trustee avers that the $100.00 exemption for intangibles con-

tained in Indiana Code Section 34-2-28-1[2] would be applicable. The trustee prays this Court enter an order requiring the debtor to turn over to the trustee all Navy pension payments received since the date of the filing of the petition until the claims of the creditors are satisfied.

The debtor maintains he has no present interest in the future benefits which are contingent upon his survival. Thus, he has no interest which could become property of the estate. Additionally, the debtor asserts that the benefits are necessary to his obtaining a fresh start since as an over-the-road truck driver he expends approximately $188.13 weekly for his tractor main-

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2. Ind. Code Ann. §34-2-28-1 (Burns Supp. 1980).

tenance and fuel.

To determine what constitutes property of the estate, initially we turn to Section 541 of the Bankruptcy Code[3] which states in pertinent part:

> Section 541. Property of the estate.
>
> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Thus, the question becomes whether the retirement benefits are a legal or equitable interest of the debtor in property. The Code, however, neither defines "property" nor "interest in property."

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3. 11 U.S.C.A. §541 (1979).

Under the Bankruptcy Act of 1898, the question of what is property under Section 70(a) was a federal question [4] and we find no reason to believe that it is not a federal question under the Bankruptcy Code.[5] In addressing this question, the United States Supreme Court has determined in cases arising under the Bankruptcy Act that the purposes of the Bankruptcy Act itself ultimately determines the scope and limitations of the term "property."[6] To this end, the Supreme Court explained that there is a twofold purpose which must be balanced:

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4. Segal v. Rochelle, 382 U.S. 375 (1966).

5. In re Ford, No. 79-2-1846-L (Bankr. Ct. Md. April 15, 1980); 4 Collier on Bankruptcy, ¶541.02 at 541-12 (15th ed. 1980).

6. Kokoszka v. Belford, 417 U.S. 642 (1974); Segal, supra.

first, the purpose of converting the estate into cash for distribution among creditors, and second, the purpose of providing the debtor with a fresh start by leaving him free after the date of the filing of his petition to accumulate new wealth in the future.

Considering these purposes in determining whether inchoate claims for loss-carryback refunds are property, in dicta in Segal v. Rochelle,[7] the Court stated:

> However, limitations on the term [property] do grow out of other purposes of the Act; one purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future. Accordingly, future wages of the bankrupt do not constitute "property" at the time of bankruptcy nor, analogously, does an intended bequest to him or a promised gift--even though state law might permit all of these to be

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7. Segal, supra, at 379

> alienated in advance. [citations omitted.]

However, the advent of the Bankruptcy Code of 1978 diminishes the relevance of this analysis due to the broadened scope of paragraph (1) of subsection (a) of Section 541. The Senate Judiciary Committee reporting on Section 541 of Senate Bill 2226 stated:[8]

> Paragraph (1) has the effect of overruling Lockwood v. Exchange Bank, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even than needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it...

The House Report on Section 541 of House Bill 8200 recites the above language

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8. S. Rep. No. 95-989, 95th Cong., 2nd Sess. 82 (1978).

verbatim.[9] Accordingly, the legislative history indicates Congress' intent that the purposes of the Bankruptcy Code would not control what constitutes property in the same manner that the purposes were controlling under the repealed Bankruptcy Act. However, the principal that future wages do not constitute property at the time of the filing of the debtor's petition remains sound.

The military retirement benefits in the case at bar are paid monthly on the contingency that the debtor is alive on the first day of each month. The military plan differs from other pension plans in that it is non-contributory, is entirely taxable, and is subject to garnishment and attachment. These qualities

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9. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977).

liken the payments to wages.

Section 1315 of title 10 of the United States Code[10] states that a member of the armed forces retired for length of service "is entitled to retired pay" to make explicit the entitlement. First, noteworthy is the word choice of this provision as the word "pay" connotes "wages." Second, the right to payment must be distinguished from the payment itself. Although the statute grants an entitlement, the entitlement is the only interest which the debtor has at the commencement of his bankruptcy case, not the payments themselves. The debtor does not have the ability to proceed to a court or law to enforce his interest in receiving future payments by demanding the future payments at the present time.

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10. 10 U.S.C.A. §1315 (1975).

Rather, the debtor may proceed to court to protect his right to the future payments, the right to payment being the only "property" in which the debtor has an interest at the commencement of the case. The right to future payment is of no value to the debtor's estate due to the fact that the Navy will not make a lump sum distribution or any distribution in advance.[11]

Viewing the Navy retirement benefits as future wages, the Court finds that the future payments are not property in which the debtor has an interest under Section 541 of the Bankruptcy Code. Accordingly,

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11. Because the debtor does not have a present right to withdraw benefits, his entitlment would also fall outside the definition of property found in Indiana Code §31-1-11.5-2 for purposes of dissolution of marriage. Ind. Stat. Ann. §31-1-11.5-2 (Burns 1980).

the trustee's application for turnover is hereby denied.

This order constitutes the findings of fact and conclusions of law required by Bankruptcy Rule 752.[12]

SO ORDERED.

/s/ Robert K. Rodibaugh
UNITED STATES BANKRUPTCY JUDGE

cc: Ward W. Miller, Esq.
Mark C. Chambers, Esq.

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12. F.R. Bankr. P. 752

Notes of Decisions

1. Mental temperament

Upon examination of the finding of the retiring board in the case of Paymaster Rodney, of the Navy, the proceedings in which took place in June, 1871, and were approved by the President August 31, 1871, who at the same time directed that Paymaster R. be retired on furlough pay, advised that the board found the latter incapacitated upon the sole ground that his peculiar mental temperament unfitted him for active service in the navy, that his consequent retirement was not "because of misconduct," and that there is no legal ground for setting aside the proceedings of the retiring board and revoking the order of retirement in his case. 1873, 15 Op.Atty.Gen. 446.

§ 6330. Enlisted members: transfer to Fleet Reserve and Fleet Marine Corps Reserve; retainer pay

(a) The Fleet Reserve and the Fleet Marine Corps Reserve are composed of members of the naval service transferred thereto under—

(1) Title II of the Naval Reserve Act of 1938 (52 Stat. 1178), as amended; or

(2) this section.

(b) An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve. An enlisted member of the Regular Marine Corps or the Marine Corps Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Marine Corps Reserve.

(c) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled, when not on active duty, to retainer pay at the rate of 2½ percent of the basic pay that he received at the time of transfer multiplied by the number of years of active service in the armed forces. A member may recompute his retainer pay under section 1402 of this title to reflect active duty after transfer. If the member has been credited by the Secretary of the Navy with extraordinary heroism in the line of duty, which determination by the Secretary is final and conclusive for all purposes, his retainer pay shall be increased by 10 percent. However, in no case may a member's retainer pay be more than 75 percent of the basic pay upon which the computation of retainer pay is based.

(d) For the purposes of subsections (b) and (c), a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded. A completed minority enlistment is counted as four years of active service, and an enlistment terminated within three months before the end of the term of enlistment is counted as active service for the full term. Aug. 10, 1956, c. 1041, 70A Stat. 396; Aug. 1, 1958, Pub.L. 85-583, § 1(2), (3), 72 Stat. 480.

1963 U.S.Code Cong. and Adm.News, p. 912. See, also, Pub.L. 90-207, 1967 U.S. Cong. and Adm.News, p. 2218; Pub.L. 96-342, 1980 U.S.Code Cong. and Adm. News, p. 2612; Pub.L. 96-513, 1980 U.S. Code Cong. and Adm.News, p. 6233.

Library References
Armed Services ⇐22.4
C.J.S. Army and Navy § 31.

§ 6327. Officers and enlisted members of the Naval Reserve and Marine Corps Reserve: 30 years; 20 years; retired pay

[See main volume for text of (a)]

(b) Each member who is transferred to the Retired Reserve under subsection (a) is entitled, when not on active duty, to retired pay at the rate of 50 percent of the basic pay of the grade in which retired.

[See main volume for text of (c) to (e)]

As amended Oct. 2, 1963, Pub.L. 88-132, § 5(h)(5), 77 Stat. 214.

Library references: Armed Services ⇐13.5(6); C.J.S. Army and Navy § 20.

1963 Amendment. Subsec. (b). Pub.L. 88-132 substituted "of the grade in which retired" for "to which he would be entitled if on active duty" following "50 percent of the basic pay."

Effective Date of 1963 Amendment. Amendment of section by Pub.L. 88-132 effective Oct. 1, 1963, see section 14 of Pub.L. 88-132, set out as a note under section 201 of Title 37, Pay and Allowances of the Uniformed Services.

Legislative History: For legislative history and purpose of Pub.L. 88-132, see 1963 U.S.Code Cong. and Adm.News, p. 912.

§ 6330. Enlisted members: transfer to Fleet Reserve and Fleet Marine Corps Reserve; retainer pay

[See main volume for text of (a) and (b)]

(c)(1) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled, when not on active duty, to retainer pay—

(A) in the case of a member who first became a member of a uniformed service (as defined in section 1407(a)(2) of this title) before the date of September 8, 1980, at the rate of 2½ percent of the basic pay that he received at the time of transfer or, in the case of a member who has served as master chief petty officer of the Navy or sergeant major of the Marine Corps, of the highest basic pay to which he was entitled while so serving, if that basic pay is higher than the basic pay received at the time of transfer; or

(B) in the case of a member who first became a member of a uniformed service (as defined in section 1407(a)(2) of this title) on or after September 8, 1980, at the rate of 2½ percent of the monthly retainer pay base computed under section 1407(d) of this title;

multiplied by the number of years of active service in the armed forces.

(2) A member may recompute his retainer pay under section 1402 or 1402a of this title, as appropriate, to reflect active duty after transfer.

(3) If the member has been credited by the Secretary of the Navy with extraordinary heroism in the line of duty, which determination by the Secretary is final and conclusive for all purposes, his retainer pay shall be increased by 10 percent.

(4) In no case may a member's retainer pay be more than 75 percent of the basic pay or monthly retainer pay base upon which the computation of retainer pay is based.

[See main volume for text of (d)]

As amended Dec. 16, 1967, Pub.L. 90-207, § 3(4), 81 Stat. 653; Sept. 8, 1980, Pub.L. 96-342, Title VIII, § 813(d)(5), 94 Stat. 1105; Dec. 12, 1980, Pub.L. 96-513, Title V, § 513(17), (19), 94 Stat. 2932.

References in Text. The date of the enactment of the Department of Defense Authorization Act, 1981, referred to in subsec. (c), means the date of the enactment of Pub.L. 96-342, which was approved Sept. 8, 1980.

1980 Amendments. Subsec. (c). Pub.L. 96-513, substituted "September 8, 1980" for "the date of the enactment of the Department of Defense Authorization Act, 1981" wherever appearing, and "master chief petty officer of the Navy" for "senior enlisted advisor of the Navy".

Pub.L. 96-513 reworked existing provisions into pars. (1) to (3) and, as so reworked in par. (1) designated existing

It states that the purpose of § 8 of the Act of August 4, 1949, was to amend the Act of July 1, 1918, to "eliminate references to the Coast Guard", and clearly indicates that there was no intent to change existing laws relating to the Navy. The report in speaking of substantive changes in existing law brought about by the revision of Title 14 states as follows: "Throughout this revision an effort has been made to make only those substantive changes which are noncontroversial, which seem to be necessary due to changes in the Coast Guard, its functions, or its relationship to other departments of the Government; which are necessary in order to reconcile inconsistent provisions and remove obsolete and redundant language; and which seem desirable in order to parallel similar provisions having application to the Navy". The only provision from the Act of July 1, 1918, codified in Title 14 was the authority for the involuntary recall to active duty of commissioned officers and warrant officers on the retired list during war or national emergency, similar to the authority in this section.

Earlier Laws. Section 421, R.S. § 1402, was derived from Act Mar. 3, 1873, c. 230, § 1, 17 Stat. 547.

Notes of Decisions

1. Generally

It may be questioned whether Congress has constitutional power to authorize executive action which should result in setting aside the legal effect of the proceedings of a naval board and in restoring to the active list of the Navy one who had been retired thereunder. The law divides the Navy into two distinct classes, with distinct duties and distinct grades of pay. The retired list was to be filled from the active list, and an officer once placed upon it was off the active list and not a subject of promotion. The higher grades on the active list were to be constantly supplied by streams of promotion from below, the fountain being at the lowest grade of all and supplied from without. The practical construction put upon the statute by the executive has been that officers are placed upon each of these lists by the action of the President in conjunction with the Senate, the concurrence of the Senate to the appointment of an officer on the retired list being obtained by its approval of the nomination of his successor in his place by name. It may be questioned whether the Congress could, without abolishing the office, constitutionally remove an officer from an office into which he had been legally inducted, and still more whether it could place him in another office without the constitutional action of the President. These points not decided. Thompson v. U. S., 1883, 18 Ct.Cl. 634, 642.

Retired officers called upon active duty do not return to the active list unless under circumstances of a peculiar character. 1851, 17 Op.Atty.Gen. 36.

§ 6482. Retired enlisted members of the Regular Navy and Regular Marine Corps: authority to recall

In time of war or national emergency the Secretary of the Navy may order to active duty any retired enlisted member of the Regular Navy or the Regular Marine Corps. Aug. 10, 1956, c. 1041, 70A Stat. 417.

Historical and Revision Notes

Source (U. S. Code)

34 U.S.C. 423

Source (Statutes at Large)

Mar. 3, 1915, ch. 83, 38 Stat. 941 (8th par.); Aug. 29, 1916, ch. 417, 39 Stat. 591 (2d par.).

Explanatory Notes

The words "for such service as he may be able to perform" are omitted as surplusage. The words "of the Regular Navy or the Regular Marine Corps" are inserted for clarity, since this section is applicable only to retired enlisted members of the Regular Navy and the Regular Marine Corps. The recall to active duty of retired enlisted members of the Naval Reserve and the Marine Corps Reserve is covered by §§ 672 and 673 of this title. Reference to pay and allowances is omitted as superseded by § 201 of the Career Compensation Act of 1949 (37 U.S.C. 232).

tain the grades or ratings they hold at the time of their release. Aug. 10, 1956, c. 1041, 70A Stat. 417.

Historical and Revision Notes

Source (U. S. Code)

34 U.S.C. 434

Source (Statutes at Large)

July 1, 1918, ch. 114, 40 Stat. 719 (1st 9 lines of 2d par.).

Explanatory Notes

The words "who has been ordered into active service since April 6, 1917" are omitted as executed. The words "to higher enlisted grades or ratings" are inserted for clarity. The eligibility of retired enlisted men for appointments to warrant and commissioned grades is covered by chapter 539 of this title where the requirements for these appointments are set forth. The words "unless entitled to a higher grade under another provision of law" are inserted to make it clear that retired enlisted members are not precluded by this section from obtaining the benefits of other provisions of law that may give a higher grade to them on their release from active duty.

The provision relating to pay, allowances, and benefits is omitted because it was superseded by §§ 514 and 516 of the Career Compensation Act of 1949 (37 U.S.C. 314 and 316).

Cross References

Pay of retired personnel on active duty, see section 115 of Title 37, Pay and Allowances.

§ 6485. Members of the Fleet Reserve and Fleet Marine Corps Reserve: authority to recall

(a) A member of the Fleet Reserve or the Fleet Marine Corps Reserve may be ordered by competent authority to active duty without his consent—

(1) in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter;

(2) in time of national emergency declared by the President; or

(3) when otherwise authorized by law.

(b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period and shall be physically examined at least once during each four-year period. If any member fails to report for the physical examination, the Secretary may order any pay due that member forfeited. Aug. 10, 1956, c. 1041, 70A Stat. 417.

Historical and Revision Notes

Source (U. S. Code)

34 U.S.C. 854d (1st 87 words of 2d proviso).
34 U.S.C. 854e (less 2d through 8th provisos).
34 U.S.C. 854 (note)

Source (Statutes at Large)

June 25, 1938, ch. 690, § 206 (1st 87 words of 2d proviso), 52 Stat. 1179; July 9, 1952, ch. 608, § 808, 66 Stat. 508.
June 25, 1938, ch. 690, § 206 (less 2d through 8th provisos), 52 Stat. 1179; Apr. 25, 1945, ch. 152, 59 Stat. 162.
July 9, 1952, ch. 608, § 803 (3d sentence), 66 Stat. 505.

Explanatory Notes

In subsection (a) the words "A member of the Fleet Reserve or the Fleet Marine Corps Reserve" are substituted for the words "Enlisted men so transferred to

continuous two year period of service and is now covered by section 1483(a) of this title.

Effective Date of 1962 Amendment. Amendment by Pub.L. 86-513 effective Sept. 15, 1961, but the authority to prescribe regulations under the amendment by Pub.L. 86-513 effective on Dec. 12, 1960, see section 701 of Pub.L. 86-513, set out as a note under section 101 of this title.

Effective Date of 1958 Amendment. Amendment by Pub.L. 85-422 intended to restate without substantive change the law in effect on Oct. 22, 1958, see section 8 of Pub.L. 85-422, set out as a note under section 2254 of Title 5, Government Organization and Employees.

Effective Date of 1949 Amendment. Amendment of section by Pub.L. 81-351 effective Oct. 1, 1949, see section 14 of Pub.L. 81-122, set out as a note under section 201 of Title 37, Pay and Allowances of the Uniformed Services.

Legislative History: For legislative history and purpose of Pub.L. 85-422, see 1958 U.S.Code Cong. and Adm.News, p. 3212. See, also, Pub.L. 85-861, 1958 U.S.Code Cong. and Adm.News, p. 4446; Pub.L. 86-513, 1960 U.S.Code Cong. and Adm. News, p. 3222.

Library references

Armed Services ⇔12, 12.5(10).
C.J.S. Army and Navy §§ 16, 17, 23.

§ 6485. Members of the Fleet Reserve and Fleet Marine Corps Reserve: authority to recall

[See main volume for text of (a)]

(b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period.

As amended July 30, 1977, Pub.L. 95-79, Title VIII, § 805, 91 Stat. 333.

1977 Amendment. Subsec. (b). Pub.L. 95-79 struck out requirements relating to physical examinations for members of the Fleet Reserve and Fleet Marine Corps Reserve.

Legislative History. For legislative history and purpose of Pub.L. 95-79, see 1977 U.S.Code Cong. and Adm.News, p. 327.

§ 6487. Repealed. Pub.L. 96-513, Title III, § 302(b), Dec. 12, 1980, 94 Stat. 2903

Section, Act Aug. 10, 1956, c. 1041, 70A Stat. 418, related to the retirement pay of certain rear admirals who retire after serving two years on active duty in time of war or national emergency.

Effective Date of Repeal. Repeal effective Sept. 15, 1981, see section 701 of Pub.L. 96-513, set out as a note under section 101 of this title.

§ 6488. Repealed. Pub.L. 96-513, Title III, § 302(c), Dec. 12, 1980, 94 Stat. 2903

Section, Act Aug. 10, 1956, c. 1041, 70A Stat. 418, related to the retention of certain wartime appointments or promotions upon release from active duty. See section 1370 of this title.

Effective Date of Repeal. Repeal effective Sept. 15, 1981, see section 701 of Pub.L. 96-513, set out as a note under section 101 of this title.

CHAPTER 577—DEATH BENEFITS; CARE OF THE DEAD

§ 6521. Repealed. Pub.L. 85-861, § 36(21), Sept. 2, 1958, 72 Stat. 1571

Section, Act Aug. 10, 1956, c. 1041, 70A Stat. 418, related to allowances to dependents, and to designation of beneficiary, and is now covered by sections 1475-1480 of this title.

unhampered by the pressure and discouragement of pre-existing debt", an effect in direct contravention of the stated purpose of this title. Rutledge v. City of Shreveport, D.C.La.1975, 387 F.Supp. 1277.

Rule and policy of fire department prohibiting firemen from declaring bankruptcy under penalty of automatic dismissal conflicted with this title in that it effectively hampered firemen from obtaining new opportunity in life and clear field for future effort and was therefore unconstitutional and invalid under U.S. C.A.Const. Art. 6, cl. 2. Matter of Loftin, La.App.1976, 327 So.2d 543, certiorari denied 331 So.2d 851.

Fireman, automatically discharged upon his filing of bankruptcy pursuant to rule which was unconstitutional and invalid under U.S.C.A.Const. Art. 6, cl. 2, in that it conflicted with this title, was entitled to payment of back wages; furthermore, where record did not show extent, if any, of earnings by fireman during period he was unemployed in excess of what he was earning by part-time employment prior to his dismissal, there was no basis for granting offset against or mitigation of award for back pay. Id.

2. Vehicles

Provision of A.R.S. § 28-1163(B) that a discharge in bankruptcy did not relieve an individual from having his driver's license suspended if he failed to satisfy a judgment entered against him in an action arising out of operation of a motor vehicle was invalid under U.S.C.A.Const. Art. 6, cl. 2 as being in conflict with mandate of former section 35 of this title providing that receipt of a discharge in bankruptcy fully discharged all but certain specified judgments. Perez v. Campbell, Ariz.1971, 91 S.Ct. 1704, 402 U.S. 637, 29 L.Ed.2d 233.

McKinney's N.Y. Vehicle and Traffic Law former § 94-b, effect of which was that no judgment debtor in negligence action could by obtaining bankruptcy discharge rid himself of liability of suspension of motor vehicle operator's license unless paying judgment to extent of $5,000, or giving security to avoid suspension of license, was invalid as denying bankrupt full effect of discharge in bankruptcy. In re Perkins, D.C.N.Y.1933, 3 F.Supp. 697.

Discharge in bankruptcy was a "stay, satisfaction, or discharge of judgment" in personam against bankrupt for injuries to one struck by his automobile, within Code Pub.Gen.Laws Supp.1935, art. 56, § 187B requiring suspension of operator's license of any person failing to satisfy final judgment for damages resulting from operation of motor vehicle; such provision not applying to judgment debtors, discharged in bankruptcy. Ellis v. Rudy, 1937, 180 A. 284, 171 Md. 280.

Court must assume that Legislature did not intend to create futile conflict with former sections 1(12) and 35 of this title in enacting Code Pub.Gen.Laws Supp. 1935, art. 56, § 187B requiring suspension of motor vehicle operator's license for failure to satisfy final judgment for damages resulting from operation of such vehicle, and hence must presume that construction giving effect to such former provisions without impairing operation of discharge in bankruptcy was Legislature's purpose, in absence of unequivocal expression of different intention. Id.

SUBCHAPTER III- THE ESTATE

§ 541. Property of the estate

(a) The commencement of a case under under [1] section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) The estate shall have the benefit of any defense available to the debtor as against an entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

Pub.L. 95–598, Nov. 6, 1978, 92 Stat. 2594.

[1] So in original.

Historical and Revision Notes

Notes of Committee on the Judiciary, Senate Report No. 95–989. This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)[former section 110(a)(6) of this title]), and all other forms of property currently specified in section 70a of the Bankruptcy Act § 70a [former section 110(a) of this title], as well as property recovered by the trustee under section 542 of proposed title 11, if the property recovered was merely out of the possession of the debtor, yet remained "property of the debtor." The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or leasehold interest, for example. The result of Segal v. Rochelle, 382 U.S. 375 (1966)[86 S.Ct. 511, 15 L.Ed.2d 428], is followed, and the right to a refund is property of the estate.

Though this paragraph will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case. For example, if the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had. But see proposed 11 U.S.C. 108, which would permit the trustee a tolling of the statute of limitations if it had not run before the date of the filing of the petition.

Paragraph (1) has the effect of overruling Lockwood v. Exchange Bank, 190 U.S. 294 (1903)[23 S.Ct. 751, 47 L.Ed. 1061, 10 Am.Bankr.Rep. 107], because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate. The broad jurisdictional grant in proposed 28 U.S.C. 1334 would have the effect of overruling Lockwood independently of the change made by this provision.

Paragraph (1) also has the effect of overruling Lines v. Frederick, 400 U.S. 18 (1970)[91 S.Ct. 113, 27 L.Ed.2d 124].

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. This section

CERTIFICATE OF SERVICE

I certify under penalties for perjury I have this date mailed three (3) complete copies of this document, postage prepaid, to counsel for the respondent, W. Lewis Burke, Jr., School of Law, University of South Carolina, Columbia, South Carolina 29208.

Dated 8-31-82

Ward W. Miller

Office - Supreme Court, U.S.
FILED
OCT [illegible] 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WARD W. MILLER, Trustee in Bankruptcy,

Petitioner,

-vs-

JAMES STEWART LEGARE HAYNES, SR.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I. QUESTION PRESENTED

Does Navy retainer pay and retired pay earned after a sailor has filed for relief under Chapter 7 of the United States Bankruptcy Code constitute property of a bankruptcy estate?

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IV. STATUTES INVOLVED

Chapter 39 of the General Military Law,

10 U.S.C. § 688, provides, inter alia:

> (a) Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be ordered to active duty by the Secretary of the military department concerned at any time.

Article 2 of the Code of Military Justice,

10 U.S.C. § 802 provides, inter alia:

> The following persons are subject to this chapter:
> (4) Retired members of a regular component of the armed forces who are entitled to pay
> (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

Subtitle C, entitled "Navy and Marine

Corps" of Title 10 of the United States

Code provides,

10 U.S.C. 6330, inter alia:

> (b) An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve . . .

(c)(1) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled when not on active duty, to retainer pay -

10 U.S.C. § 6331, inter alia:

(a) When he has completed 30 years of service or when he isfound not physically qualified in an examination under section 6485 of this title, a member of the Fleet Reserve or the Fleet Marine Corps Reserve shall be transferred -

(1) To the retired list of the Regular Navy . .

10 U.S.C. § 6485, inter alia:

(a) A member of the Fleet Reserve or the Fleet Marine Corps Reserve may be ordered by competent authority to active duty without his consent -

(1) in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter;

(2) in time of national emergency declared by the President or

(3) when otherwise authorized by law.

(b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period [and shall be physically examined at least once during each four-year period. If any member fails to report for the physical examination, the Secretary may order any pay due that member forfeited.]

(b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period. (Bracketed provision was deleted by amendment of July 30, 1977, Pub. L. 95-79, Title VIII, § 805, 91 Stat. 333.)

Chapter 5 of the United States Bankruptcy Code Provides, 11 U.S.C. § 541 inter alia:

(a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(6) Proceeds, product, offspring, rents and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

V. STATEMENT OF THE CASE

This case began when the Respondent-debtor, James S. L. Haynes, Sr. and his wife, Joanne G. Haynes, filed a joint voluntary petition for bankruptcy on July 11, 1980. They filed for relief under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C.A. § 701 et. seq. The debtors listed in their petition some $35,390.53 in debts. Of this amount, $3,000 was owed to a secured creditor and was apparently satisfied by the return of the collateral, and $26,600.22 was owed to another secured creditor, North American Van Lines. This debt to North American was subsequently readjusted to $35,180.31

and reaffirmed by the debtors. The remaining amount, $10,978.81, was owed to unsecured creditors.

The debtors listed exempt assets of $5,135.00 and assets subject to distribution of $3,643.09. There is no record of whether any of these non-exempt assets were secured by the trustee and distributed.

In the petition, the debtors listed their income from Mr. Haynes' employment as a contract truck driver for North American Van Lines and from his service in the Fleet Reserve of the United States Navy. According to the testimony of Mr. Haynes at the meeting of the creditors he retired in 1971 from active duty in the Navy. Under the terms of 10 U.S.C.A. § 6330, Mr. Haynes was transferred to the Fleet Reserve and was entitled to receive retainer pay for the next ten (10) years.

After the meeting of creditors, the Petitioner-Truetee applied for an order to compell the Respondent to turn over his future monthly pay checks from the Navy until all of the debts were paid. If such an order had been issued, the case would have been held open for approximately one and a half-years.

However, on October 31, 1980, the Bankruptcy Court granted a discharge to the debtors. Without any further evidentiary hearings, on March 6, 1981 the Bankruptcy Court ruled on the trustee's turn-over application and held that Mr. Haynes' retirement pay was in the nature of future wages and not property of the estate. Therefore the Bankruptcy Court denied the relief sought by the Trustee.

By consent obtained from the debtors' former attorneys, the trustee appea'ed the Order of the Bankruptcy

Court directly to the Seventh Circuit Court of Appeals under the terms of 28 U.S.C.A. § 1293(b). Subsequently, the Court of Appeals affirmed the decision of the Bankruptcy Court.

VI. ARGUMENT SUMMARY

The commencement of a Chapter 7 bankruptcy effects a date of cleavage. All legal or equitable property interests that the debtor owned as of the commencement of the case become property of the estate. 11 U.S.C.A. § 541(a)(1). Unless the debtor can exempt these property interests from the estate under 11 U.S.C.A. § 522(b), the trustee liquidates these property interests for distribution to creditors holding allowed unsecured claims. See 11 U.S.C. §§ 704(a)(1) and 726. In contrast, the debtor is entitled to retain free from the claim of the trustee most property interests that the debtor

acquires after the commencement of the case.[1]

Significantly, 11 U.S.C.A. § 541(a)(6) expressly excludes from the property of the estate "earnings from services performed by an individual debtor after the commencement of the case." Respondent-Debtor Haynes asserts that the retainer pay and retired pay here in issue are earnings excluded from the property of

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1. 11 U.S.C.A. § 541(a)(5) provides that if the debtor acquires property interests by specified types of transfers within 180 days after the commencement of the case, the property interests constitute property of the estate. The provision applies only to acquisitions of property interests.

"(A) by bequest, devise, or inheritance

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce debree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan."

the estate by 11 U.S.C.A. § 541(a)(6). Therefore, the questions of whether retainer pay and retired pay are exempt under 11 U.S.C.A. § 522(b) or whether retainer pay and retired pay constitute "property" within the meaning of 11 U.S.C.A. § 541(a) are not before this Court. The retainer pay and retired pay in issue constitute earnings for services Mr. Haynes performed after the commencement of the case rather than deferred compensation for services performed prior to the commencement of the case. In United States v. Tyler, infra, this Court held that military retirement pay constituted reduced compensation for reduced services. And the decision of the Seventh Circuit in this case is consistent with Tyler and does not conflict with any decisions of this Court, any other Circuit Courts of Appeals or any of the highest courts of the states.

VII. ARGUMENT

In United States v. Tyler, 105 U.S. 244 (1881) this Court held that military retirement pay is reduced compensation for reduced current services. Under the Bankruptcy Code, "earnings from services performed by an individual debtor after commencement of . . ." a bankruptcy are specifically excluded from seizure by the trustee. See 11 U.S.C.A. § 541(a)(6). In this case the property sought by the trustee is compensation earned for served performed by Mr. Haynes after he filed his bankruptcy petition.

The trustee cannot succeed in this case unless this Court is prepared to overrule its decision in United States v. Tyler, supra. In Tyler, an Army Captain who had been retired due to wounds received in battle brought suit seeking an increase in his pay as provided by a statute which had increased the pay of Army officers.

The Captain had been denied the increase because he was retired; however, this Court held that a retired Army officer is still in the military service of this country and entitled to the pay increases provided by Congress. This Court's reasoning was summarized as follows:

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service. (Emphasis in opinion.)

Supra at 246.

The status of retired military officers and enlisted personnel has changed little since the Tyler decision.

Retired officers and retired enlisted men who served in a war are entitled to wear their uniforms. See 10 U.S.C. § 772. Retirees remain members of the armed services. See 10 U.S.C. § 5001. Retirees may be recalled to active duty at any time. See 10 U.S.C. § 688. Retirees are subject to the Uniform Code of Military Justice and may be tried by courts martial. See 10 U.S.C. § 802 and O'Callahan v. Parker, 395 U.S. 258 (1968). And retirees may be dismissed from the military service. See Hooper v. United States 326 F.2d 982 (Ct.Cl. 1964) cert. den. 377 U.S. 977 (1964) and Hooper v. Laird, 482 F.2d 784 (D.C. Cir. 1973). Therefore, the Respondent Haynes remains under the same obligations as Captain Tyler.

In fact, when Mr. Haynes filed his bankruptcy petition he was not classified as a retiree. Upon completion of

twenty years active service, Mr. Haynes was transferred to the Fleet Reserve under 10 U.S.C.A. § 6330(b) and received retainer pay (as opposed to retired pay) for service as a Fleet Reservist. See 10 U.S.C.A. § 6331(c). As a Fleet Reservist, Mr. Haynes remained a member of the Naval Service of the United States. See 10 U.S.C.A. 5001(1) and (3). As a Fleet Reservist, Mr. Haynes was subject to perform up to two months of active duty training for every four years in the Fleet Reserve, and prior to 1977 Mr. Haynes was subject to report for physical examinations. See 10 U.S.C.A. § 6485 (amendment of July 30, 1977 by Pub.L. 95-79 deleted the requirement of physical examinations.) In 1980 Congress enacted 10 U.S.C.A. § 688 which provides that " . . . a retired member of the Regular Navy . . . may be ordered to active duty by the Secretary [of the Navy] at

any time." The reality is that Mr. Haynes can be ordered to active duty today.

Despite the assertions of the Trustee, all other Americans cannot be ordered to active duty. The Selective Service Act does not establish that every civilian citizen not exempted is subject to conscription. (See pp. 18-19 of the Trustee's Petition.) The Selective Service Act provides that males between eighteen (18) and twenty-six (26) years of age may be required to register with the Selective Service and 50 App. U.S.C. § 456 (cited by the Trustee) established exemptions in case of a mobilization. Even those subject to registration are not subject to conscription at present. Mr. Haynes can be re-called at any time.

There is no question that Mr. Haynes' does not have to report to work everyday, but his potential duties and obligations are substantial. As a Fleet

Reservist, his pay from the Navy was denominated "retainer pay." This nomenclature is particularly appropriate in light of Mr. Haynes potential obligations and is one very common to the legal profession. To earn a retainer, one is expected to render service when requested but none which is not requested. See Rhode Island Exch. Bank v. Hawkins, 6. R.I. 198 (1859). Just as with legal retainers, Mr. Haynes pay is earned by his availability.

Congress' designation of Mr. Haynes' compensation as "pay" demonstrates the intent to distinquish such compensation from pensions or welfare benefits. And like active duty pay, Mr. Haynes' pay is subject to income taxation, see generally 26 U.S.C. §§ 61 and 122, and ceases upon his death. Finally, such pay is subject to termination or reduction by Congress and therefore Mr. Haynes has no vested interest or right in his retirement pay.

See Bell v. United States 366. U.S. 393 (1961).

In 1981, this Court recognized that Congress may have intended military retired pay to be current compensation for current services and advised caution to prevent disruption of our nation's scheme for military prepardness. See McCarty v. McCarty 453 U.S. 210, at 223, fn. 16. (1981). The petitioner presents no compelling circumstances that would require an overruling of United States v. Tyler, supra. Nor do the facts of this case justify a disruption of the present scheme of Congress for insuring the availability of well-trained and experienced veterans.

VIII. CONCLUSION

As the decision below does not conflict with any decisions of the other Circuit Courts or the highest courts of any states and the decision is in accord

with the prior decisions of this Court, the Trustee's petition should be denied.

Respectfully Submitted,

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